IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22740 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MAHAMAD HUSEN @ MAMMU CHAND MAHAMAD SHAIKH (HANSOTI)

Versus

STATE OF GUJARAT AND OTHERS

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Appearance :
MS BANNA DATTA WITH MR AR SHAIKH for Petitioner(s) : 1,
RULE SERVED BY DS for Respondent(s) : 1 - 2.
Mr. N.D. Gohil, Asst. GOVERNMENT PLEADER for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 19/07/2006

ORAL JUDGMENT

On 12th June 2006, learned advocate for the petitioner pointed out that even though the detention order against the petitioner-detenu was revoked, the petitioner was not released from custody for about 35 days. On behalf of the concerned Police Officer, an explanation is given in the form of an affidavit. However, in order to incorporate the said facts in the body of the petition, learned advocate for petitioner has filed an amendment. A copy thereof is served on Mr. N.D. Gohil, learned Assistant Government Pleader. Amendment as sought for is granted.

By filing this petition, the petitioner has prayed for appropriate writ, order or direction for quashing and setting aside the order of detention dated 02.10.05 by which the petitioner is ordered to be detained as a 'dangerous person'.

The matter was listed for hearing before this Court on 12.06.06 when learned advocate Ms. Banna Datta pointed out to the Court that though the order of detention of the petitioner was revoked on 16.11.2005, the petitioner was not released from the jail till 21st December 2005. Hence, on 12.6.2006, this Court passed the following order:

> "Ms. Banna Datta, learned advocate for the petitioner submitted that even though the order of detention of the petitioner was revoked, the petitioner continued in detention for more than 35 days. The concerned jailor has also filed his reply. It seems that it is not in

> dispute that even though the order of detention was revoked by the Government, the petitioner was not released forthwith. Under these circumstances, there is justification in the prayer of the petitioner that adequate compensation be awarded. Mr. Gohil submits that he wants to go through the file, which is not available with him today. At his request, matter is adjourned to 14th June 2006."

In view of the aforesaid allegations, R.S. Garasia, Jailer Group 2, Nadiad, District Jail has filed his affidavit. In his affidavit, the said deponent has stated that he was recently transferred from Bharuch Sub-Jail and he was not familiar with the working system of Nadiad District Jail. It is stated that his senior, H.D. Gamiti was also on leave and therefore the deponent was holding additional charge. In his affidavit, he has stated that on 16.11.2005, the Jail Superintendent was also not available in the jail as he had gone to attend a meeting convened by I.G.Prison. According to the deponent, because of the workload, he has committed a mistake by not releasing the petitioner – detenu in compliance with the revocation order. In paragraph 3 of the affidavit, the said deponent has stated that he would be more careful in future.

Today, R.S. Garasia, Jailer Group 2, Nadiad, District Jail is present before the Court. Mr. N.D. Gohil, learned Assistant Government Pleader submitted that the competent authorities had called for the explanation of the deponent R.S. Garasia and he had submitted his explanation. Mr. Gohil, learned AGP further submitted that the explanation submitted by R.S. Garasia has been accepted by the Home Department and he has been asked to be more careful in future.

Learned advocate for the petitioner, by way of amendment, has prayed that appropriate compensation may be awarded to the detenu as he was illegally detained in custody for about 35 days.

The unamended, original petition was filed challenging the order of detention. The said order having been revoked, the said question does not survive any more. Upon amendment, the only question which now survives for consideration is whether in this petition compensation can be awarded to the petitioner on the ground that though the detention order was revoked, he continued to remain in jail and was released after about 35 days.

It is not in dispute that upon the opinion of the Advisory Board, the State revoked the detention order of the petitioner on 16.11.2005. It is also not in dispute that by wireless message No. SB III/PAS/28/2005/10/2005/1016[05] dated 16.11.2005 a direction was issued by the Home Department to release the petitioner. It is submitted that by the said wireless message, two detenues, viz. Hitesh @ Hitu Ishwarbhai Kahar and the petitioner, who were lodged in the Nadiad jail, were required to be released as their detention order was revoked. It is stated that the jail authorities at Nadiad released Hitesh @ Hitu Ishwarbhai Kahar from the custody of Nadiad jail, but since he was required in connection with some other offence, he was sent to Surat. This means that in compliance with the wireless message, he was released from the custody of the Jail at Nadiad. Thus it is contended that even though the wireless message was common for two prisoners, i.e. the petitioner and Hitesh @ Hitu Ishwarbhai Kahar, only Hitesh was released and

the petitioner was not released. Apart from that, the petitioner was not released even subsequently till the matter came up for hearing before this Court on 21.12.2005. Ms. Datta submitted that on 21.12.2005 when the matter came up before the Court, a statement was made by the learned AGP that the detention order was revoked and therefore she sought permission to withdraw the petition. The Court therefore dictated an order disposing of the petition accordingly. However, before the said order could be signed, relatives of the petitioner informed learned advocate Ms. Banna Datta that though the detention order is revoked, the petitioner is still not released. Therefore, on oral request, the said order was not signed and the matter was adjourned to 27.12.05. Thus, the petitioner was released only after the matter came up before the learned Single Judge on 21.12.2005. The aforesaid facts clearly reveals that without any rhyme or reason the petitioner was kept in custody for 35 days, which may amount to illegal detention.

The explanation sought to be rendered by the concerned Jailer that the petitioner was not released through an oversight is not very satisfactory in view of the fact that one out of the two persons named in the wireless message was promptly released. Apart from that, in the present sittings, I have come across another case also [Special Civil Application No. 11189 of 2006] wherein also the detenu was not released in spite of the fact that his detention order was revoked by the State Government.

Once the order of detention is quashed or revoked, the detenu should not be kept in jail in connection with the said detention. In the instant case, though the officer has tried to

explain the lapse on his part, the concerned authorities should be very careful in future, and as and when any order of detention is set aside by the Courts or revoked by the State, the detenu must be released from custody forthwith in connection with the said detention; otherwise it may amount to illegal custody. In the present case, even though by the same wireless message two persons were ordered to be released as their detention orders were revoked, one person was released whereas the petitioner was not released. He was not even released by the jail authorities for about 35 days and he was released only after the matter came up for hearing before this Court. It, therefore, primafacie appears that there is a lapse on the part of the concerned authorities.

So far as the detention of the petitioner from the date of the revocation till the release is concerned, it would clearly amount to illegal detention and the same is also in violation of Article 21 of the Constitution of India. It is hoped that the State administration will be more careful in future. The Home Department of the State may give appropriate instructions to the jail authorities that and as and when any order of detention is set aside by the Courts or revoked by the State, the detenu should be released from custody forthwith in connection with the said detention. One can understand if the delay is for few hours to complete the requisite formalities or may be even a couple of days due to workload or oversight, but in the instant case, the detenu remained in the custody for almost 35 days even after his detention order is revoked. The State administration is, therefore, directed to be more vigilant and careful in future as this Court has taken a judicial notice of such serious lapses on the part of the administration.

The State is, therefore, directed to take appropriate steps so that such lapses are not repeated in future.

So far as the prayer for granting damages is concerned, Ms. Banna Datta, learned advocate for the petitioner has relied upon the judgment in the case of **SUBE SINGH vs. STATE OF HARYANA reported in (2006) 3 SCC 178.** In paragraph 31, the Apex Court observed as under:-

> "31. Though illegal detention and custodial torture were recognized as violations of the fundamental rights of life and liberty guaranteed under Article 21, to begin with, only the following reliefs were being granted in the writ petitions under Article 32 or 226.
>
> (a). direction to set at liberty the person detained, if the complaint was one of illegal detention.
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> (b). direction to the Government concerned to hold an inquiry and take action against the officers responsible for the violation.
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> (c). if the inquiry or action taken by the department concerned was found to be not satisfactory, to direct an inquiry by an independent agency, usually the Central Bureau of Investigation.
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> Award of compensation as a public law remedy for violation of the fundamental rights enshrined in Article 21 of the Constitution, in addition to the private law remedy under the law of torts, was evolved in the last two-and-a

half decades.”

It is required to be noted that in the aforesaid judgment ultimately, the Honourable Supreme Court did not award compensation as there was no clear or incontrovertible evidence.

In the instant case, the petition was basically filed for quashing and setting aside the order of detention. It is no doubt true that in a given case, this Court can award compensation even in a petition under Article 226 of the Constitution. However, since the present petition is mainly filed against the order or detention, it would not be just and proper to fix any compensation in the present proceedings. Moreover, the question of awarding compensation can be decided only after appreciating the evidence on record as to whether the petitioner was not released with a deliberate intention or that there was a genuine mistake or that there was any mens-rea on the part of the concerned jail authorities in not releasing the petition. All these questions are required to be decided after recording evidence. It would not be just and proper to pass any order in the present petition awarding compensation. Ms. Datta, learned advocate for the petitioner states that the petitioner may be granted liberty to take appropriate proceedings by either filing a civil suit for damages or approach the concerned authorities for damages or approach the Human Rights Commission as may be deemed fit by the petitioner. It would be open to the petitioner to take out appropriate proceedings before the appropriate Court/Forum as deemed fit for claiming damages for his illegal detention.

On behalf of the petitioner, it is submitted that at the time when a person is detained under preventive detention, intimation is given to near relatives. It is argued that similar practice should be also followed at the time when the order is revoked by the Government, so that even if there is some lapse on the part of the authorities, the relatives may take up follow up action and ensure early release of the detenu. There is some substance in the submission of the learned advocate. The State may also consider whether on revocation of a detention order by the State, is it possible to inform the near relatives in the same manner in which it is informed at the time of detention so that the relatives can also take proper care to ensure that the detenu is released without delay, and if it is feasible, appropriate directions may be issued in this regard also.

This Court is parting with this matter with a heavy heart since a person was kept in illegal detention for almost 35 days even after his detention order was revoked. The petitioner remained in jail for almost 35 days for no fault on his part and without there being any lawful order passed in this regard. This Court, therefore, hopes and trusts that the authorities will be more careful in future while dealing with such situation. All the same, since the petitioner has sought liberty to take out appropriate proceedings for claiming damages, the observations made in this order may be treated to have been made only in connection with deciding the controversy in the present proceedings. Ultimately, it is for the concerned Court / Forum to decide the question of compensation after considering the evidence that may be lead before it.

Subject to what is stated above, this petition is disposed of. Rule is discharged. No order as to costs.

Copy of this judgment may be given to Mr. N.D. Gohil, learned Assistant Government Pleader for forwarding it to Home Department for information and for taking remedial measures in future.

[P. B. MAJMUDAR, J.]

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